STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 99B016

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LARRY D. DUNGAN,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael S. Gallegos, on September *25,* 1998, 1998 at 1525 Sherman Street, Room B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General Steven A. Chavez. Complainant appeared *pro* s*e.*

MATTER APPEALED

Complainant appeals a disciplinary 30 (thirty) day suspension (leave) without pay. For the reasons set forth below, **Respondent is affirmed**.

PREHEARING MATTERS

1. Exhibits

a. Complainant's Exhibits A and C were not accepted into evidence as irrelevant to the issues at hearing. Complainant's Exhibit B was not accepted into evidence as lacking in sufficient foundation to be reliable or trustworthy.

b. Complainant's Exhibit D, the results of a second drug test taken July 30, 1998, was accepted into evidence over objection by Respondent as irrelevant. The results of a second drug test taken within *30* (thirty) days of the first test, at issue in this case, were found to be

relevant with regard to the reliability of the results of the first test, i.e. for impeachment purposes.

c. Complainant's Exhibits E and G were accepted into evidence without objection from Respondent.

d. Respondent's Exhibits I through 8, 9 and 15 through 18 were offered and accepted into evidence with no objection from Complainant.

2. Witnesses

a. Respondent called the following witnesses in support of its' case: Mr. Owen B. Leonard, Regional Transportation Director, Region Three and appointing authority in this matter; Mr. Keith W. Patton, National Medical Review Chief Operating Officer; Dr. Joseph H. Cummings, M.D., Medical Review Officer for National Medical Review; Mr. Phillip Anderle, Colorado Department of Transportation (CDOT) Highway Maintenance Supervisor II. (On the motion of Respondent and without objection from Complainant, the latter three witnesses testified by telephone.)

b. Complainant testified on his own behalf.

ISSUES

1. Whether Complainant committed the act which gave rise to the disciplinary action. In this case, whether Complainant voluntarily ingested something containing tetrahydrocannabinol (THC), a psycho-active ingredient which resulted in test results of more than 15 (fifteen) nanograms of THC per milliliter.

2. Whether Complainant's act warranted the disciplinary action imposed.

3. Whether Respondent's actions in imposing the disciplinary action were arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant is a Highway Maintenance Worker II for the Colorado Department of Transportation (CDOT), a position which requires driving. Complainant drives 3/4 ton trucks,

dump trucks and other large vehicles as part of his job duties. He is the “lead worker” over 4 (four) other crew members and is required to hold a Colorado Commercial Driver’s License.

2. CDOT Procedural Directive 1245.1. entitled ‘Substance Abuse and Drug and Alcohol Testing” (Respondent’s Exhibit 8) prohibits the use of drugs and alcohol, including marijuana, by any CDOT driver. A CDOT "driver” is any employee that is required to hold a Colorado Commercial Driver’s License. Therefore, Procedural Directive 1245.1 applies to Complainant.

3. Drug and alcohol testing *is* required for CDOT drivers to ensure compliance with federal law, i.e. the Omnibus Transportation Employee Testing Act (OTETA) of 1991, Title 40 Code of Federal Regulations Part 382-40, Drugfree Workplace Act of 1988 (P.L. 100-690 Title V Subtitle D).

4. Complainant received a copy of Procedural Directive 1245.1 on May 31, 1998 and was aware of the possibility for random drug testing and the prohibition against the use of drugs and/or alcohol.

5. Complainant also received a copy of an employee “handbook”, entitled “Controlled Substances & Alcohol Use and Testing: Information for Employees” by J. J. Keller and Associates, Inc. (Complainant’s Exhibit E.)

6. On July 8, 1998, a regular work day for Complainant, Complainant was given a random urinalysis (drug test) as per Procedural Directive 1245.1. The test was properly administered and a valid analysis was performed by Glenwood Medical Associates. An unbroken chain of custody for the specimen was documented. Validity of test administration and analysis and an unbroken chain of custody was confirmed by National Medical Review, the firm that oversees administration and verification of the random drug tests for CDOT. (Respondent’s Exhibits 2 and 3.) However, a split sample was either not taken or not documented. (Respondent’s Exhibit 3.)

7. A split sample (split specimen) is required in the event that the specimen donor, in this case Complainant, wishes to challenge the test results and have the split specimen sent to and re-tested at another certified laboratory. A request for split sample re-testing must occur with 72 (seventy-two) hours *of* notification of positive test results unless there *is* a legitimate reason for an untimely request. (Complainant’s Exhibit E, page 13, paragraph 6.)

8. The results of Complainant’s test were positive for marijuana. (Respondent’s Exhibits 2 and 9.)

9. At the time of the test, Complainant told the medical review officer that he had smoked marijuana in the past, shortly after high school.

10. There were no irregularities in the taking of a specimen, analysis or chain of custody for Complainant’s July 8, 1998 specimen.

11. Complainant's supervisor is Mr. Phillip Anderle, a Maintenance Foreman. Mr. Anderle's supervisor is Mr. John Smith, the Section Supervisor.

12. Mr. Smith verbally informed Mr. Owen Leonard, the Regional Director of Transportation and appointing authority, regarding Complainants positive drug test results, Mr. Leonard advised both Mr. Smith and Mr. Anderle to schedule an R833 meeting.

13. An R833 meeting was held on July 28, 1998. In attendance were Complainant, who waived representation; Mr. Phillip Anderle, Complainant's supervisor and Mr. Owen Leonard, the appointing authority. Complainant did not object to Mr. Anderle's presence at the meeting and, at the meeting, stated that the test results were a "false positive". He offered *3* (three) documents to support the theory that ingestion of hemp-seed products, e.g. Early Morning Rising coffee with hemp-seed additives, can create a false-positive result on drug tests. (Respondent's Exhibit 5, 6*,* 7 and 18.)

14. The active ingredient in marijuana which makes it an illegal drug and distinguishes it from most hemp-seed products is tetrahydrocannabinol (THC), a psycho-active ingredient. Federal policies and guidelines consider THC levels above 15 (fifteen) nanograms of THC per milliliter to be indicative of marijuana use. (Respondents' Exhibit 7 and the testimony of Mr. Keith Patton.)

15. Some hemp-seed products, e.g. ″Seedy Sweetie" candies and hemp-oil products, e.g. Hemp Liquid Gold (a replacement for essential fatty acids), have been verified through scientific testing to contain sufficient THC to cause a false-positive test result for marijuana. (Respondent's Exhibit 17 and *United States v. Gaines,* USAF Court Martial, as reported in Army Times".)

16. Generally, it is difficult to consume sufficient quantities of hemp seed or hemp oil products, e.g. coffee and/or hemp beer, to produce 15 (fifteen) nanograms of THC per milliliter.

17. Complainant did not, at the R833 meeting in this matter or at hearing, claim to have consumed products containing hemp seed or hemp oil or any product which has been verified through scientific testing to raise THC levels to more than 15 (fifteen) nanograms per milliliter.

18. Complainant's test results showed a THC level of 37 (thirty-seven) nanograms per milliliter.

19. At the R833 meeting, Mr. Anderle asked Complainant if he had faxed his request for a split sample re-test to the National Medical Review offices.

20. Complainant states that he faxed his request for a split sample re-test to PharmChem Pharmaceuticals, a company that reviews test administration and analysis.

21. Following the R833 meeting Mr. Leonard contacted National Medical Review (NMR) who denied that hemp products would cause a false-positive result. However, NMR stated that if there were a legitimate medical explanation for the positive test results, they would overturn the results.

22. NMR reviews all CDOT drug and alcohol test results to insure accuracy of administration of the test, validity of the analysis and unbroken chain of custody for the specimens taken.

23. The results of Complainant's test were reported on a "worksheet"/ Result Verification form (Respondent's Exhibit 9). The form indicates that the 72 hour (split sample re-test) option was explained to Complainant. It also indicates that complainant was not ("N") taking Marinol, a prescription drug used for cancer and/or glaucoma which can cause a false positive result for marijuana.

24. NMR received no request for a split sample re-test from Complainant.

25. The United States Department of Transportation (USDOT) has policy and guidelines for handling the assertion by an individual that a positive test result is due to the legal ingestion of food or supplements containing hemp. (Respondent's Exhibits 15, 16 and 17.) These policies and guidelines were implemented by NMR in handling Complainant's assertion that his positive test result was due to the legal ingestion of food or supplements containing hemp.

26. On July 31, 1998 Complainant voluntarily submitted to a drug and alcohol test, the results of which were negative for all drugs and alcohol, (Complainant's Exhibit D.)

DISCUSSION

In a disciplinary action case the burden is upon the Respondent to prove by a preponderance of the evidence that the acts, on which the discipline was based, occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Cob. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Cob. App. 1995).

1. Hemp products /just cause

In this case, the verified results of a random urinalysis taken on July 8, 1998 indicate that Complainant ingested marijuana, or some product which contained and/or produced more than 15 nanograms per milliliter of THC, i.e. the act (ingestion) occurred. The question that remains

is whether there was a legitimate medical explanation for the positive test results, e.g. were the test results due to the ingestion of hemp products, as opposed to smoking marijuana, i.e. does just cause warrant the discipline imposed.

Complainant offered possible alternative reasons for his positive test results. He stated that the positive test results may have been due to his consumption of coffee containing hemp seed. However, he did not indicate when or for how long he may have consumed such coffee and he did not rebut Dr. Cummings' assertion that it would be difficult to consume sufficient amounts of coffee with hemp additives to produce a positive test result. Further, Complainant offered products, by name, that have been verified as capable of producing more than 15 nanograms per milliliter in drug tests but he did not indicated that he had consumed any of the specifically named products.

It is a reasonable conclusion, and the test results and testimony of the medical review officer support, that Complainant's positive test results were not due to the ingestion of hemp products.

2. Split sample / arbitrary and capricious action

Complainant argues that no split sample was retained for the event of a challenge was arbitrary and capricious action on the part of Respondent. The documentation indicates that no split sample was retained. (Respondent Exhibit *3.)* However, the issue requires a two part analysis: 1) Was a split sample properly retained? and 2) Was a retest of the split sample properly requested? If a split sample was properly retained but no retest requested, the retention of the split sample becomes moot.

In this case, Complainant appears to have requested a split sample re-test after the 72 hour deadline for making such requests (Complainant's Exhibit E) *and* made the request to an organization (PharmChem Pharmaceuticals) other that the medical review officer or National Medical Review, who had custody of the split sample. Complainant presented no documentation of his request for a re-test. His request for a re-test, if at all made, was not properly made. If there had been a split sample retained, there would not have been a re-test. Therefore, the fact that a split sample was not retained is a moot point.

Complainant's second test, taken July 30, 1998, casts doubt on the reliability of the first test taken July 8, 1998. However, any doubts about the reliability of the first test were overcome by the testimony of NMR officials regarding trustworthiness of documentation confirming test results. (Respondent's Exhibits 2, 3 and 9.)

CONCLUSIONS OF LAW

1. Complainant tested positive for marijuana and it is a reasonable conclusion and supported by the evidence that such positive test was not caused by the ingestion of hemp products, i.e. that the positive results were due to the ingestion of marijuana.

2. A thirty day suspension without pay was within the alternatives available to Respondent and is reasonable considering Complainant's job duties, i.e. driving large vehicles on and off the highways of Colorado.

3. Respondent did not act arbitrarily, capriciously or contrary to rule or law.

ORDER

The actions of Respondent are affirmed.

Dated this 9th day
of November, 1998
at Denver, Colorado

_____ ____
Michael S. Gallegos
Administrative Law Judge

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the _____ day of November, 1998 a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVF LAW JUDGE** was place in the United States mail, postage pre-paid, addressed as follows:

Mr. Larry D. Dungan
129 East 11th Street
Rifle, Colorado 816~()

and in the interoffice mail to:

Mr. Steven A. Chavez
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. *To abide &v the decision of the Administrative Law Judge ("AIJ'3.*

2. *To appeal the decision of the AL] to the State Personnel Board ("Board"). To appeal the decision of the ALI~ a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the AL] is mailed to the parties. Section 24-4-105(15), C.R.S.. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the AL] is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado. 793 P.2d 657 (Cob. App. 1990); Sections 24-4-105(1 4) and (15), C.R.S.); Rule R-8-58., 4 Code of Cob. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the AL.J., then the decision of the AL.J. automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Cob. App. 1990).*

RECORD ON APPEAL

The party appealing the decision of the AL] must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is $50. 00. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by flinch paper only. Rule R-8-64, 4 Code of Cob. Reg. 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 Code of Cob Reg. 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the AL] must be filed within 5 calendar days after receipt of the decision of the AL!. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.